IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated.: 20.11.2007

CORAM:

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

Second Appeal Nos.481 and 482 of 1995

N.Subramanian .. Appellant in both the S.As.

-Vs-

1. Thanjiammal .. 1st Respondent in S.A.No.481 of 1995
2. Pachiammal .. 2nd Respondent in S.A.No.481 of 1995
& Respondent in S.A.No.482 of 1995

APPEALS filed under Section 100 of Code of Civil Procedure against the judgment and decree made in A.S.Nos.60 and 69 of 1994 dated 22.12.1994 on the file of the Court of Subordinate Judge, Tiruvannamalai, reversing the judgment and decree made in O.S.Nos.231 of 1990 and 16 of 1991 dated 21.04.1994, respectively, on the file of the Court of the District Munsif, Polur, Tiruvannamalai-Sambuvarayar District.

For Appellant in both the S.As. : Mr. M.Venkatachalapathy, S.C., for Mr. S.M.Loganathan

For Respondents in both the S.As. : No Appearance, for R-1, in S.A.No.481 of 1995
Ms. A.Sathyabhama, for Mr. T.R.Rajaraman, for R-2 in S.A.No.481 of 1995 & for respondent in S.A.No.482 of 1995

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C O M M O N J U D G M E N T

The plaintiff in O.S.No.231 of 1990 on the file of the District Munsif Court, Polur who succeeded in the suit but lost the appeal in A.S.No.60 of 1994 on the file of the Sub-Court, Thiruvannamalai, is the appellant in Second Appeal No.481 of 1995. The plaintiff in O.S.No.231 of 1990 was the defendant in O.S.No.16 of 1991 on the file of the District Munsif Court, Polur, and he succeeded in the suit, but the decree passed in O.S.No.16 of 1991 was reversed in A.S.No.69 of 1994 and hence he has filed Second Appeal No.482 of 1995. For the

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sake of convenience the parties are referred to as per their ranking in the suit.

2. The brief facts that are necessary for the disposal of the above second appeals are set-out below:-

(a) The plaintiff-Subramanian is the son of Narayanaswamy Gounder @ Kannu Gounder through his wife-Thanjiammal-the first defendant and the second defendant is the sister of the plaintiff-Subramanian. Narayanaswamy Gounder and his brother Rangaswamy Gounder were enjoying their ancestral properties without making division till their death. After their death Thanjiammal, Subramanian and Radhakrishnan-son of Rangaswamy Gounder entered into a registered partition deed dated 27.12.1972. Under that, partition 'A' schedule fell to the share of Thanjiammal and Subramanian and 'B' schedule therein was allotted to the share of Radhakrishnan. Thanjiammal executed a registered settlement deed dated 12.07.1990 in favour of her daughter-Pachiammal in respect of a specified extent of two acres in S.F.No.314/2 together with a half share in the Well and motor pumpset fitted in the Well. Subsequently by another registered document dated 30.07.1990, Thanjiammal cancelled the settlement deed executed in favour of Pachiammal.

(b) On 25.07.1990 Subramanian filed a suit in O.S.No.231 of 1990 before the District Munsif Court, Polur, against his mother-Thanjiammal and sister-Pachiammal seeking a decree for permanent injunction in respect of the entire extent of 3.94 acres in S.F.No.314/2 and the Well and motor pumpset fitted thereto and also got an order of interim injunction. Pending the said suit Pachiammal filed O.S.No.16 of 1991 on the file of the same Court against Subramanian for declaration, recovery of possession and for mesne profits in respect of the property settled on her by her mother under the settlement deed dated 12.07.1990.

(c) The case of Subramanian as put forth in the above said two suits is that he becomes the absolute owner of the 'A' schedule property of the partition deed after the death of his mother-Thanjiammal and his mother had been given only a life interest; as his mother is an aged women, he was looking after her out of the income derived from the said property and he is in continuous possession and enjoyment of the same; the patta and the electricity service connection of the Well stands in his name; Pachiammal who is in hostile terms with him got a sham and nominal settlement deed executed in her favour by his mother who had no right to settle the property; since Pachiammal attempted to disturb the possession it has become necessary for him to file the suit for permanent injunction. It is his further case that after coming to know about the fraud played upon her by Pachiammal, Thanjiammal executed a registered cancellation deed dated 30.07.1990 cancelling the settlement deed dated 12.07.1990; the settlement deed executed by Thanjiammal is a sham and nominal document which was not acted upon

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as possession was never delivered to Pachiammal and the settlement has not come into force.

(d) Whereas the case of Pachiammal, the second defendant in O.S.No.231 of 1990 and the plaintiff in O.S.No.16 of 1991, is that the settlement deed was executed by her mother on her own will and volition; the settlement was accepted by her and the same has been acted upon and the settlement deed is not sham and nominal as contended by Subramanian; she was put in possession of the property settled under the Settlement deed dated 27.12.1972, Thanjiammal has got an absolute right over the property settled under the settlement deed; the recitals contained in the earlier part of the partition deed will prevail over the recitals contained in the latter part of the partition deed and the contention of Subramanian that Thanjiammal got only a life interest under the partition deed is untenable; though she was put in possession of the property settled on her, Subramanian by taking advantage of the exparte order of injunction obtained against her and her mother, trespassed into the property and had taken forcibly possession on 25.07.1990; hence she has filed the suit in O.S.No.16 of 1991 for declaration of her title to the suit property as well as for delivery of possession of the same and for mesne profits.

3. In O.S.No.231 of 1990 the first defendant-Thanjiammal remained exparte. Though the subject matter of the suit and the parties are same and the issues that arose for consideration were also same, for the reasons best known to the trial court, both the suits were tried separately and separate judgments have been rendered. After framing appropriate issues in both the suits, the suits were taken up for trial and during trial, in O.S.No.231 of 1990, on the side of the plaintiff, the plaintiff-Subramanian has been examined as P.W.1, Thanjiammal has been examined as P.W.2 and two others have been examined as P.Ws.3 and 4 and Exs.A-1 to A-15 have been marked and on the side of the defendants, Pachiammal the second defendant has been examined as D.W.1 and one Kannan who has attested the settlement deed has been examined as D.W.2 and Ex.B-1 has been marked. The cancellation deed has been marked as X-1. In O.S.No.16 of 1991 the plaintiff-Pachiammal has been examined as P.W.1 and the attestor of the settlement deed has been examined as P.W.2 and the settlement deed has been marked as Ex.A-1 and on the side of the defendant-Subramanian has been examined as D.W.1, Thanjiammal has been examined as D.W.2 and one Aarimuthu has been examined as D.W.3. The cancellation deed dated 30.07.1990 has been marked as Ex.X-1. The partition deed dated 27.12.1972 has been marked as Ex.X-2.

4. On a consideration of the oral and documentary evidence adduced in the suits, the trial court decreed O.S.No.231 of 1990 in favour of Subramanian and dismissed O.S.No.16 of 1991 filed by Pachiammal. Being aggrieved by that Pachiammal preferred appeals in A.S.No.60 and 69 of 1994 respectively before the Sub-Court,

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Thiruvannamalai. The lower appellate court on a consideration of the evidence on record reversed the judgment and decree of the trial court in both the suits and partly allowed the appeals. The lower appellate court upheld the validity of settlement deed, dismissed the suit for injunction filed by Subramanian on the ground that injunction cannot be granted against the co-owner, but even after holding the settlement deed as valid and the cancellation deed as invalid did not grant a decree for declaration, but directed Pachiammal to file a suit for partition. Being aggrieved by the judgment and decree passed in the said appeals, Subramanian has filed the above appeals, whereas Pachiammal has not filed any appeal. Since as above said the subject matter of both the appeals is one and the same and the same witnesses have been examined in both the suits and the issues that arise for consideration are also one and the same both the above second Appeals are being disposed of by a common judgment.

5. While admitting the above second appeals the following common substantial questions of law have been framed:-

> "(1) Whether the Court below is justified in deciding the correctness of the revocation deed dated 30.07.1990 when admittedly the same was not challenged by the 2nd defendant till suit is filed by the appellant?
> (2) Whether the Court below is justified in holding that the appellant's possession will enure to the 2nd defendant so as to create a joint ownership?
> (3) Whether the Court below having found that the possession was never handed over to the 2nd defendant, is justified in rejecting the claim for injunction?"

6. Heard Mr. M.Venkatachalapathy learned senior counsel for Mr.S.M.Loganathan for the appellant and Mrs. A.Sathyabama learned counsel for Mr. T.R.Rajaraman learned counsel for the second respondent in S.A.No.482 of 1995.

7. Learned senior counsel for the appellant submitted that under the partition deed Thanjiammal has been given only a life interest in respect of the 'A' schedule to the partition deed; the latter clause in partition deed alone will prevail and the intention of the parties was that Thanjiammal should get only a life interest and not an absolute right; when Thanjiammal has been given only a life interest she cannot validly execute the settlement deed in favour of her daughter-Pachiammal; when admittedly Subramanian the appellant is in possession of the suit property possession would not have been given under the settlement deed as recited therein and therefore it should be held that the settlement deed was not acted upon. He further submitted that Thanjiammal being the life interest holder could not execute the settlement deed and that too in respect of an undivided share and Thanjiammal herself in her evidence as D.W.2 has stated that she was taken to the Sub-Registrar's Office by her daughter and

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one Kannan-P.W.2 and she was made to sign in a document and she had put her signature without knowing the contents thereof and she was not aware that she was executing a settlement deed and immediately after coming to know about the fraud played upon her she had executed a cancellation deed cancelling the settlement deed, but no acceptable evidence has been adduced by Pachiammal, the plaintiff in O.S.No.16 of 1991, to rebut the evidence of Thanjiammal; this aspect has not been properly considered by the lower appellate court. He further submitted that when admittedly Subramanian is in possession of the suit property, the lower appellate court has committed an error in reversing the judgment of the trial court and dismissing the suit for injunction. He further submitted that when a finding has been recorded that possession was not handed over to Pachiammal the lower appellate court erred in dismissing the suit for injunction. He further submitted that Thanjiammal is an illiterate lady and by playing a fraud upon her and by exercising undue influence the settlement deed had been got executed in her favour by Pachiammal and as such the burden is on Pachiammal to prove that the settlement deed was executed by Thanjiammal on her own will and volition fully knowing the contents of the document. In support of his contentions the learned senior counsel for the appellant relied upon the following decisions:-

(i) 1996 (II) CTC 279 (Dharman v. Marimuthu) wherein in paragraph 17 it is observed as follows:-

> "17. ... The fact that the Written Statement did not contain a positive accusation of any undue influence having been played by the plaintiff upon the deceased first defendant cannot be blown out of proportion in the teeth of the very admissions contained in the plaint about certain facts which would go to show beyond doubt if at all, only the dominating position in which the plaintiff was placed viz. the first defendant rather than going to exculpate the plaintiff from the charge of having exercised such undue influence. It is not the specific mention of the very word undue influence that really matters but the existence of the relevant facts in the case pleaded and proved that is only relevant and sufficient".

(ii) (1993) I MLJ 259 (Varadhan v. Pattammal) wherein in paragraph 8 it is observed as follows:-

> "8. Courts in India have on the rule of evidence enshrined in Secs.101 and 102 in Chapter VII of the Evidence Act, particularly in cases of women in India who in some parts and some communities are pardanashin and in most parts of the country illiterate, for the reason that they transact their business generally through malefolk only, men always dominated women, and women lived a life dominated by men, this being the curse that always surrounded women folk even though law recognised

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their independent rights, they failed invariably in exercising such rights, accepted that onus lies upon the defendant to show that there has been no fraud, undue influence or coercion in the transaction. One could easily, since the plaintiff alleged mis-representation and fraud, ask her to prove the mis-representation and fraud. But not in a case where a women being an illiterate and unaware of the contents signed the document. Unless fully and faithfully informed about the contents, she cannot be asked to bring evidence to prove her case. Learned Single Judge, in our opinion, is right in holding that the Court will not ask the plaintiff to prove the allegation but demanded from the defendant to disprove the allegation of mis-representation and fraud. The learned single Judge, in our opinion, has taken the correct view of the law on the fact that the 1st plaintiff is an illiterate woman who merely affixed her thumb impression. She is a woman who possibly could not act without help."

8. Countering the said submissions the learned counsel for the respondents submitted that the circumstances under which the settlement deed was executed by Thanjiammal in favour of her daughter-Pachiammal should be considered. He further submitted that in the settlement deed itself it has been recited as follows:-

"நீ என்னுடைய ஒரே குமாரத்தி ஆனபடியாலும் நீ என்னை இது நாள் வரை சவரட்சணை செய்து வருவதினாலும் இனிமேல் என் ஜீவ திசைவரை சவாட்சணை செய்து வருவாய் என்ற நம்பிக்கையினாலும் உன் பேரில் எனக்கு இருக்கும் அன்பினாலும் பிரியத்தாலும் பாசத்தினாலும் உனக்கு ஒரு சொத்து ஆதரவு செய்து வைக்க வேண்டும் என்ற நீண்ட நாள் ஆவலை பூர்த்தி செய்யும் பொருட்டு எனக்கு சொந்தமான கீழ்கண்ட ரூபாய் 46500.00 இந்த ரூபாய் நாற்பத்தி ஆறாயிரத்து ஐந்து நூறு மதிப்புள்ள சொத்தை உனக்கு தான செட்டில்மெண்ட் எழுதிக் கொடுத்து சொத்தையும் இன்றே உம்மிட சுவாதினம் ஒப்புக் கொடுத்து விட்டேன்."

Learned counsel for the respondents further submitted that in consonance with the said recitals P.W.2 in her evidence has also stated as follows:-

"என் பொண்ணும் அதே ஊரில் தான் இருக்கிறாள். எங்க பொண்ணுக்கு வசதி குறைவு. கூடிடம்தான். 4, 5 பசங்கள் இருக்கிறாங்க."

According to the learned counsel for the respondents, since the daughter- Pachiammal was not living in an affluent circumstances only with an intention to make provision for her support the settlement deed had been executed by Thanjiammal and that intention has been categorically stated in the settlement deed itself and the same has also been spoken to by her in her evidence. Further P.W.2 in her cross-examination had stated that on coming to know about the

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execution of the settlement deed by her in favour of her daughter, the relationship between her and her son-Subramanian became strained and the strained relationship became smooth after the settlement deed was cancelled and she was living only with her son and she has also stated that at the time of execution of the cancellation deed her son-Subramanian was present along with her in the Sub-Registrar's Office. According to the learned counsel, the above said evidence of P.W.2 makes it crystal clear that the cancellation deed would have been executed only under the pressure exerted by Subramanian. Learned counsel further submitted that though a contention has been put forth by the appellant that the settlement deed was got executed by exercising undue influence and fraud and by making misrepresentation, such averments are conspicuously absent in the cancellation deed itself. Learned counsel further submitted that P.W.2 has also not stated in her evidence that either fraud was played upon her or she was coerced or she executed the settlement deed under undue influence exercised by Pachiammal. Learned counsel submitted that if the allegations like fraud, misrepresentation or undue influence are raised such allegations should be pleaded with material particulars and in this case such material particulars and specific averments are missing and therefore the contention of the appellant that the settlement deed was executed under undue influence, fraud and coercion is liable to be rejected. Learned counsel further submitted that once a registered settlement deed had been executed the same cannot be revoked and as such the revocation deed executed by Thanjiammal is non-est in law and it can be ignored by Pachiammal and if really the settlement deed had been executed by Thanjiammal due to the fraud, undue influence etc., as contended by the appellant nothing prevented Thanjiammal from filing a suit seeking a decree for cancellation of the settlement deed, but so far no such steps have been taken. Learned counsel submitted that in the settlement deed itself no right has been reserved by Thanjiammal to cancel the settlement deed and as such the cancellation deed is invalid.

9. Learned counsel for the respondents submitted that under Section 123 of the Transfer of Property Act, if an immovable property is settled under registered sale deed the title in the property will be transferred in favour of the transferee and it is not stipulated in the said provision that possession should be handed over immediately. According to the learned counsel, the contention put forth by the learned senior counsel for the petitioner that since possession had not been handed over under the settlement deed, the settlement deed has not come into force and the same has not been acted upon is against the said proportion contained in Section 123 of the Transfer of Property Act.

10. Learned counsel for the respondents further submitted that under the partition deed Thanjiammal has got an absolute right in the 'A' schedule property along with her son-Subramanian. According to

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the learned counsel, the first clause in the partition deed will prevail over the latter clause and even if a life estate is given, the same can be settled by the life estate holder and as such the contra contention put forth by the appellant is liable to be rejected. Learned counsel further submitted that since Subramanian had instituted O.S.No.231 of 1990 on 25.07.1990 and an exparte order of injunction was obtained against Pachiammal, taking advantage of the same Subramanian had trespassed and taken possession. Learned counsel further submitted that all the above said aspects have not been considered by the trial court and therefore the lower appellate court by applying the correct principles of law to the facts of this case and after recording convincing reasons has set-aside the judgment and decree passed by the trial court; the trial court has overlooked the well settled proposition of law that injunction cannot be granted against a co-owner; the lower appellate court having upheld the validity of settlement deed and having held that Pachiammal has become a co-owner with Subramanian has rightly dismissed the suit for injunction. In support of the above said submissions the learned counsel relied upon the following decisions:-

(i) 1997 (I) CTC 256 (Kuppuswami Mudali J. V. Mahalingam) wherein in paragraphs 11 and 12 it is observed as follows:-

> "11. In order to hold that it is a valid settlement we have to find out whether the settlee has accepted the said document. It is also a settled law that in settlement once the settlee accepts the transfer it is presumed that the said document has been acted upon irrespective of the fact whether the settlee has obtained possession immediately or not. A reading of the entire document Ex.A-1 as pointed out by the two decisions referred to earlier leads to an irresistible conclusion that the power of transfer by the settles (Pappammal) alone has been postponed. As a matter of fact the said Govinda Mudali has not written anything in the said document. Hence the contrary conclusion reached by the trial court cannot be sustained. On the other hand the lower appellate court correctly construed Ex.A-1. When there is no provision or reservation in the settlement deed by the settler, namely, Govinda Mudali it is presumed that he has no right to cancel the said settlement deed at a later date. If that is so the cancellation of Ex.A-1 under Ex.B-8 cannot be sustained.
>
> 12. The following decisions cited by the learned counsel for the respondent amply support the above view of mine. In Lallu Singh v. Gur Narain, A.I.R. 1992 All. 467, the Full Bench of the Allahabd High Court while interpreting Section 123 of the Transfer of Property Act has held that "Delivery of possession is not necessary, Section 123, does away with the necessity of delivery of possession even if it was

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required by the strict Hindu Law, in the case of a registered instrument of gift properly executed and attested" .... A similar view has been arrived at in a decision reported in Gouranga Sahu v. Maguni Dei, A.I.R. 1991 Ori. 151. In Balmakund v. Bhagwan Das, 1894 Allahabad Series 185, the Division Bench has observed as follows:-

> "The delivery to the donee of immovable property of the deed of gift is sufficient to pass the title to such property to the donee without actual physical possession such property being taken by the donee. Man Bhari v. Navindh followed"."

(ii) AIR 1996 Supreme Court 2220 (N.B.Subrahmanyam v. A.Hymavathi) wherein in paragraph 5 it is observed as under:-

"5. The said recital clearly would indicate that the settlement deed executed on that date is to take effect on that day. She created rights thereunder intended to take effect from that date, the extent of the lands mentioned in the Schedule with the boundaries mentioned thereunder. A combined reading of the recitals in the document and also the schedule would clearly indicate that on the date when the document was executed she had created right, title and interest in the property in favour of her second daughter but only on her demise she was to acquire absolute right to enjoyment, alienation etc. In other words, she had created in herself a life interest in the property and vested remainder in favour of her second daughter. It is settled law that the executant while divesting herself of the title to the property could create a life estate for her enjoyment and the property would devolve on the settlee with absolute rights on settlor's demise. A reading of the documents together with the Schedule would given an indication that she had created right and interest in prasenti in favour of her daughter Vimalavathy in respect of the properties mentioned in the schedule with a life estate for her enjoyment during her lifetime. Thus, it could be construed rightly as a settlement deed but not as a Will. Having divested self thereunder, right and title thereunder, she had, thereafter, no right to bequeath the same property in favour of her daughter Hymavathy. The trial Court and the learned single Judge rightly negatived the claim. The Division Bench was not, therefore, correct in law in interfering with the decree of the trial Court."

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(III) AIR 1996 Bombay 36 (Nagpur Bench) (Prakash S. Akotkar v. Mansoorkha Gulabkha) wherein in paragraph 5 it is observed as follows:-

> "5. .... Having found the character of possession as co-owner, as indicated above, the only question that arises for determination is, whether a co-owner in possession is entitled to an injunction of this nature against the other co-owners. Once it is found that the possession of co-owner is for and on behalf of other co-owners, the other co-owner cannot claim injunction of this nature so as to exclude the other co-owners from exercising their right as co-owners."

11. I have carefully considered the submissions made by the learned counsel on either side, perused the materials available on record and judgment of the Courts below.

12. In the partition deed, dated 27.12.1972, the earlier clause reads as follows:-

> " 'A' ெடிட்டியூலில் கண்ட ரூ.3260/- மதிப்புள்ள சொத்துக்களை நம்மில் 1, 2 லக்கமிட்ட தஞ்சியம்மாள், சுப்பிரமணியன் இவர்களும், ஙஞங ெடிட்டியூல் கண்ட ரூ.1,419/- மதிப்புள்ள சொத்துக்களை நம்மில் 3 லக்கமிட்ட ராதா கிருட்டிணனும் அவரவர்கள் ெடிட்டியூலில் கண்ட சொத்துக்களை அவரவர்கள் கைப்பற்றி சர்வ சுதந்திர பாத்தியங்களுடனும் தானாதி விக்கிறையங்களுக்கு அருகமாயும் ஆண்டு அனுபவித்துக்கொள்ள வேண்டியது,"

while the latter clause reads as follows:-

> " தஞ்சியம்மாள் ஜீவியதசைக்குப் பிறகு மேற்படியார் குமாரன் சுப்பிரமணியன் பூரா சொத்தையும் சர்வ சுதந்திரங்களுடன் அனுபவித்துக் கொள்ள வேண்டியது,"

13. The trial court by construing the above said two clauses has come to the conclusion that the latter clause will prevail over the earlier clause and hence Thanjiammal will get only the life interest in the 'A' schedule property, but the lower appellate court disagreed with the above said conclusion and by applying the correct legal principle has held that the earlier clause will prevail over the later clause and accordingly held that Thanjiammal has got the 'A' schedule property along with her son-Subramanian absolutely. The trial court on an erroneous understanding of the law held that even in respect of the life interest Thanjiammal is not entitled to execute any settlement deed. It is settled law that in the case of a transfer in praesenti, the first clause of the deed would prevail over anything that may be found to be repugnant to it later. In a partition deed, the transfer takes place in praesenti and therefore the first clause in the partition deed would prevail over anything that may be found to be repugnant to it later. The said view of mine

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is amply supported by the following observation contained in paragraph 19 of the decision reported in (2006) 8 Supreme Court Cases 75 (Sadhu Singh v. Gurdwara Sahib Narike):-

> "What the court has to attempt is a harmonious construction so as to give effect to all the terms of the will if it is in any manner possible. While attempting such a construction, the rules are settled. Unlike in the case of a transfer in praesenti wherein the first clause of the conveyance would prevail over anything that may be found to be repugnant to it later, in the case of a will, every effort must be made to harmonise the various clauses and if that is not possible, it will be the last clause that will prevail over the former and giving way to the intention expressed therein". (underline supplied)

If the above legal principle is applied to the partition deed entered into between Subramanian, Thanjiammal and Radhakrishnan it could be easily held that the earlier clause confers an absolute right over the 'A' schedule of the partition deed on Thanjiammal along with her son-Subramanian. Therefore, the above said finding of the trial court is erroneous and the same has been rightly reversed by the lower appellate court.

14. Once it is held that Thanjiammal has got an absolute right along with her son-Subramanian in the 'A' schedule property dealt with in the partition deed, it goes without saying that she has got a right to execute the settlement deed in accordance with her wish. The trial court by misconstruing the joint ownership of Thanjiammal and her son-Subramanian over the 'A' Schedule property as equivalent to the joint ownership of co-parceners over the Hindu Joint Family Property and by wrongly applying the ratio laid down in 1993 (II) MLJ 172 (Ramakrishna Naidu v. Shanmugasundaram and others) has held that Thanjiammal could not have executed the settlement deed in respect of a joint family property. The trial court failed to see that it is nobody's case that the properties are the joint family properties of Thanjiammal and Subramanian and they cannot be construed to be members of a co-parcenery also and therefore the finding of the trial court is erroneous and liable to be set-aside and accordingly the lower appellate court has rightly set-aside such a finding.

15. The trial court without properly understanding the legal principles has held that Thanjiammal was entitled to cancel the registered settlement deed executed by her in favour of her daughter-Pachiammal and has held that the cancellation deed dated 30.07.1990 is valid. The lower appellate has rightly set-aside such an erroneous finding.

16. Under Section 123 of the Transfer of Property Act, a gift of immovable property should be made by a registered instrument signed by or on behalf of the donor and attested atleast by a two witnesses

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and the second requirement is there must be acceptance of the gift by the donee. The delivery of possession is not necessary and Section 123 does away with the necessity of delivery of possession even it was required by the strict Hindu Law, in the case of a registered instrument of gift properly executed and attested. The above said legal principle has been laid down in 1997 (I) CTC 256 (referred to supra). Therefore the finding of the trial court that the settlement deed executed by Thanjiammal in favour of Pachiammal is sham and nominal and it has not been acted upon since possession has not been handed over to Pachiammal is erroneous.

17. The next question that has to be considered is as to whether the settlement deed was got executed by Pachiammal by exercising undue influence, coercion and by applying fraud upon Thanjiammal. The learned senior counsel for the appellant submitted that Thanjiammal being an illiterate lady, the burden is on the beneficiary, namely, Pachiammal to prove that settlement deed was executed by Thanjiammal on her own will and volition and there was no exercise of undue influence, coercion or fraud was played upon her. While the trial court has held that the burden is on Pachiammal, the lower appellate court has held that the burden is on the plaintiff-Subramanian to prove the plea of undue influence, coercion and fraud. Admittedly, the settlement deed executed by Thanjiammal in favour of Pachiammal is a duly registered document and hence a presumption would arise that the said settlement deed was validly executed. In the decision reported in (2006) 5 Supreme Court cases 353 (Prem Singh v. Birbal) in paragraph 27 the Apex Court has observed as under:-

> "There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption."

If the above said legal principle is applied to the case on hand the settlement in question being a registered document is prima facie valid in law. It is, Subramanian, who is questioning the validity of the settlement deed and therefore, the onus of proof lies only on him.

18. Even assuming that Thanjiammal, being illiterate, the burden is on Pachiammal to prove that the settlement deed was executed by her mother on her own will and volition it has to be seen as to whether such a burden has been discharged by Pachiammal.

19. After the execution of the settlement deed it is the testimony of Thanjiammal who has been examined as P.W.2 that within two days from the date of execution she came to know that a settlement deed had been got executed from her and she had further testified that without reading out the contents of the document her signatures were obtained in the document, but admittedly, she had not sent any legal notice setting forth the above said facts and she has

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neither filed a suit to set-aside the settlement. In O.S.No.231 of 1990 she had remained exparte and had not filed any written statement. The allegations regarding undue influence, coercion, fraud, etc., said to have been played upon Thanjiammal by the attestor-Kannan have not been recited in the cancellation deed dated 30.07.1990. If the real and actual reason for cancelling the settlement deed had been the alleged undue influence, coercion, fraud etc., then such a recital would have found place in the cancellation deed. Further it is pertinent to point out that undue influence, coercion and fraud are two different aspects. If the allegation is that the settlement deed was executed due to the exercise of undue influence and coercion then the allegation of fraud cannot have the legs to stand. In the case of undue influence and coercion, the executant is aware of the contents of the document whereas in the case of fraud the executant is not aware of the character of the document or is not aware of the contents of the document. Without understanding the difference between the two allegations, the plaintiff Subramanian has made such allegations in the plaint.

20. In this context, it is pertinent to point out certain answers elicited from Thanjiammal during the course of her cross-examination. In her cross-examination Thanjiammal had stated that she does not know that the document executed by her was a settlement deed. She has stated that the reasons stated in the cancellation deed-Ex.X-1 is correct and similarly the recitals contained in Ex.X-1 are also true. Therefore it is necessary to look into the recitals contained in Ex.X-1 cancellation deed. In Ex.X-1-cancellation deed dated 30.07.1990 it is stated as hereunder:-

> "மேற்படி பாக ஆவனத்தில் என் ஆயுளுக்கு பிறகும் என் மகன் பூராவும் அடைய வேண்டுமென்றும் உள்ளது. எனவே எனக்கு உரிமையற்ற சொத்தாகும். எனக்கு பாத்தியமில்லாத கீழ்கண்ட சொத்துக்களை நாள். 12.7.90 ந் தேதியில் என் குமாரத்தியான பக்கியம்மாளுக்கு தானமாக எழுதி கொடுத்து விட்டேன் கீழ்கண்ட சொத்துக்களை. நான் பாக்கியம்மாளிடம் இது நாள் வரை ஒப்படைக்கவில்லை. மேற்படி பாக்கியம்மாள் இன்று வரை நான் தானம் கொடுத்த சொத்தை சுவாதினம் எடுத்துக் கொள்ள வில்லை. நான் எழுதிக் கொடுத்தது சரியில்லை என்று தற்போது தெரியவந்து அந்த தான செட்டில்மெண்டை இப்பத்திரம் மூலம் ரத்து செய்து விட்டேன். இனி கீழ்க்கண்ட சொத்துக்களின் மீது என் குமாரத்தி பாக்கியம்மாள் உரிமை கோர எந்தவித அதிகாரமும் கிடையாது. இந்த பத்திரம் நான் கீழ்க்கண்ட சாட்சிகள் முன்னிலையில் எழுதிக் வைத்த தான செட்டில்மெண்ட் ரத்து பத்திரம்."

As stated above, the above said recitals in the cancellation deed have been accepted by Thanjiammal as true. A close reading of the above said recitals makes it abundantly clear that only because Thanjiammal came to know that she has no absolute right over the property settled by her in favour of Pachiammal but yet she had executed the settlement deed in respect of a property over which she

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had no right she had executed the cancellation deed cancelling the settlement deed dated 12.07.1990. Thus it is clear that Thanjiammal was fully aware that she was executing the settlement deed. The reason for cancellation as stated in the cancellation deed is that she had no right over the property. The Settlement deed has not been cancelled for the reason that the settlement deed was obtained from her by Pachiammal by exercising undue influence, coercion and fraud. Even in her testimony Thanjiammal has not stated that undue influence, coercion or fraud was exercised on her. Kannan-the attestor of the settlement deed who has been examined as a witness has stated that the contents of the settlement deed were read over to Thanjiammal and only after knowing the contents of the document she had put her thumb impressions. In her evidence Thanjiammal has categorically stated that there is no enmity between her and the attestor Kannan and their relationship is smooth and therefore there is absolutely no reason to disbelieve the testimony of Kannan. As pointed out earlier, it is the evidence of Thanjiammal that on coming to know about the execution of the settlement deed in favour of her daughter her relationship with her son Subramanian became strained and only after the cancellation deed was executed their relationship became smooth. Pointing out the above said testimony of Thanjiammal, the learned counsel for the respondent submitted that the said evidence is proof enough to hold that the settlement deed came to be canceled only at the instance of Subramanian and to smoothen the relationship between Thanjiammal and Subramanian. In the light of the above said testimony of Thanjiammal the said contention merits acceptance. Hence it has to be held that the appellant had not proved the allegation of undue influence, coercion and fraud in the execution of the settlement deed by Thanjiammal. The legal presumption arising by virtue of the fact that the settlement deed is a registered document has not been rebutted by the appellant. Therefore the finding of the trial court in this aspect is erroneous and the finding of the lower appellate court has to be upheld and accordingly upheld.

21. Both the Courts below have found that the property allotted under the partition deed in favour of Thanjiammal and her son-Subramanian is in their joint possession and the same had not been divided and therefore the trial court has observed that even assuming that the settlement deed is valid, the only remedy available to Pachiammal is to file a suit for partition. The lower appellate court though upheld the validity of the settlement deed considering the above said aspects has held that Pachiammal had to file only a suit for partition and get possession of the property settled on her. When it is found that the settlement deed is valid, Pachiammal automatically becomes the co-owner of the suit property along with Subramanian. As laid down in AIR 1996 Bombay 36 (Nagpur Bench) (referred to supra). Subramanian, being a co-owner in possession, is not entitled to injunction against the other co-owner, namely, Pachiammal. Therefore the decree of the trial court granting

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injunction in favour of Subramanian has been rightly set-aside by the lower appellate court.

22. In the considered view of this Court the first substantial question of law framed in the above second appeals cannot strictly be called as substantial question of law at all. O.S.No.231 of 1990 was filed by Subramanian on 25.07.1990 and the revocation deed (Cancellation deed) dated 30.07.1990 has been executed by Thanjiammal subsequently and thus the question of challenging the revocation deed prior to the filing of the suit by Surbamanian did not arise at all. Therefore the said question of law is answered against the appellant and in favour of the respondent. It has already been held that Subramanian being a co-owner is not entitled to get an injunction in respect of the joint property against the other co-owner Pachiammal and therefore the second and third questions of law are also answered against the appellant and in favour of the respondent.

23. For the above said reasons, the above second appeals fail and the same are dismissed. However, considering the relationship of the parties to the litigation there shall be no order as to cost through out.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

srk/kk

To
1. The Subordinate Judge, Tiruvannamalai,

2. The District Munsif, Polur, Tiruvannamalai-Sambuvarayar District.

3. The Section Officer, VR Section,
High Court, Madras.

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+ 2 CCs to Mr.M.Sriram, Advocate SR NO 68545

+ 1 CC To Mr. T.R.Rajaraman, Advocate SR NO.689856

Second Appeal Nos.481 and 482 of 1995

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